

# **MONTANA PUBLIC DEFENDER COMMISSION**

Holiday Inn Downtown

Helena, MT

**February 15, 2013**

## **MINUTES**

*(Approved at the July 15, 2013 Meeting)*

### **Commissioners Present**

Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Brian Gallik, Bozeman; and Christopher Daem, Billings. Kenneth Olson, Great Falls, attended by teleconference.

### **Commissioners Absent**

Ann Sherwood, Pablo; William Snell, Billings; Majel Russell, Billings

### **Staff Members Present**

William Hooks, Chief Public Defender; Wade Zolynski, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Larry Murphy, Contract Manager; Eric Olson, Training Coordinator; Harry Freebourn, Administrative Director; Carleen Green, Accountant; Jenny Kaleczyc, Regional Deputy Public Defender, Helena

### **Liaisons**

Cathy Huston, liaison for union support staff and investigators, and Eileen Larkin, liaison for non-management appellate defender staff and attorneys, were in attendance. The union attorneys were not represented.

### **Interested Persons**

Brent Doig, Budget Analyst, Office of Budget and Program Planning (OBPP); Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Alison Paul, Executive Director, Montana Legal Services Association (MLSA); Candida Quinn; Chris Abbott, Assistant Public Defender; Lisa Kauffman, Contract Attorney

### **1. Call to Order**

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 9:15 a.m.

### **2. Approve Minutes of December 7 and December 14, 2012 Meetings (\*Action Item)**

The minutes of the December 7 and December 14, 2012 meetings were approved as drafted.

### **3. Commission Liaison/Executive Board Reports**

Support staff and investigator liaison Cathy Huston gave highlights of her written report, including tentative topics for the April support staff training, and the status of SB 133 (investigator firearms bill). Turnover, morale and pay are still issues.

Appellate defender liaison Eileen Larkin did not provide a written report, but wanted Commissioners to know her process. When the agenda is posted, she emails all appellate attorneys and support staff inviting questions, comments, and concerns. For the last two meetings she has not had any feedback from her colleagues.

#### **4. Commission Questions/Comments on Reports**

##### **A. Chief Appellate Defender Report**

Chief Appellate Defender Wade Zolynski provided a very detailed written report and made brief comments regarding his current activities—primarily supporting the budget process and OPD bills at the Capitol. He testified at the budget subcommittee that low pay and excessive turnover are crippling his operation, and provided them with the State HR Interagency Pay Tool showing where OPD ranks in comparison to other state agencies (including the Attorney General’s office, direct counterparts to the Appellate office). Chief Zolynski said that nothing is more important over the next two years than working for additional staff and funding through the legislative process.

A new rule of appellate procedure proposed by the Appellate office would create an expedited appeal to the Supreme Court when a minor is denied a judicial bypass to obtain an abortion without parental consent. It is currently on the Supreme Court website for comment.

A recent case count audit determined that a large number of cases had not been closed in the case management system, dating back to 2010. There are currently 212 open cases versus the previous ending balance of 386. Commissioner Petaja asked if any appellate work is contracted out. Approximately 15% of appeals are contracted, which comes from the appellate budget. Chief Zolynski does not generally contract with the trial attorney for the appeal, for the same reason that the Appellate office is now separate from the trial division—there are times when ineffective assistance of counsel or other conflicts are present at the appeal level.

Chief Zolynski’s written report includes updates on pending cases and successful outcomes, some of which have received press.

##### **B. Conflict Coordinator Report**

Conflict Coordinator Kristina Neal said that her office is running smoothly; hiring a part time assistant has made a world of difference and freed up a lot of Ms. Neal’s time. Case numbers have been fairly consistent, with no new spikes, but the lack of available conflict attorneys in the Great Falls region is still a problem. She would be happy to take suggestions on new attorneys to recruit in that area.

##### **C. Chief Public Defender Report**

Chief Public Defender Bill Hooks was delighted to be at a podium addressing a body other than a legislative one.

Nick Aemisegger is the new Regional Deputy Public Defender in Region 1, Kalispell, and he has hit the ground running. Chief Hooks expects that region to thrive under Mr. Aemisegger’s leadership and to be a shining example going forward.

Legislative work is going on behind the scenes in Butte as well as at the Capitol. Proposals affecting OPD are carefully reviewed to determine whether there would be a fiscal impact and if so, how much, based on objective data. Carleen Green works on several fiscal notes daily, collecting and compiling the data, consulting with OPD staff and sometimes other agencies, and responding to the fiscal note request within 48 hours. For instance, revisions to DUI laws that would increase penalties are analyzed to determine if they would result in more people choosing to go to trial, which would increase costs to the agency.

Although the reduced jail time bill (SB 53) failed, it helped bring some of what public defenders do to the forefront and showed the value of the agency. As Chief Zolynski mentioned, the turnover problem has been brought to the attention of various committees. Chief Hooks informed one committee that OPD has a staff

of working poor—a number of full time OPD employees would qualify for public defender services despite being fully employed. He noted that management is also feeling the burden of an inequitable pay situation.

Chief Hooks noted that death penalty costs are a big part of the budget and the two cases in Sidney are draining a significant portion of the capital defense budget. A prison homicide is also being treated as a capital case though it hasn't been filed as such yet, and there is a possibility of a fourth case in Billings. At the supplemental appropriation hearing yesterday, OPD requested \$700,000 in additional funds for FY 13 just for capital defense. Multiple defendants, the remote location, and the availability of experts are all variables in the Sidney cases that resulted in the supplemental request.

Commissioner Petaja asked for an update on the plan to limit cases; can the legislative committees be informed that without funding or legislative changes such as eliminating jail time for certain offenses OPD must start refusing cases? Chief Hooks said that various groups have been advised that Region 4 (Helena) is at that point. This issue will be discussed in more detail later in the agenda.

*D. Contract Manager Report*

Contract Manager Larry Murphy recently returned from Kalispell and Missoula where he conducted standards compliance interviews. In addition to face-to-face and Skype meetings, he also ensures that contract attorneys have completed the computer-based standards verification tool twice each year.

Commissioner Petaja said that one criticism of the Legislative performance audit was that some of the MOUs had not been signed. In response to the audit, Mr. Murphy changed the process to ensure 100% compliance in signed MOUs.

Chairman Gillespie asked if providing contractors with desk-top video training fulfills State Bar CLE requirements. Mr. Murphy said that all OPD training events are accredited by the State Bar, but he isn't sure if they count when delivered by video.

*E. Training Report*

Training Coordinator Eric Olson said that budget issues are a critical factor in deciding where to spend the precious few training resources. The turnover problem manifests itself in training in a couple of ways. One is that after attending training, people walk out the door not just of OPD but of criminal defense altogether. Another issue was the need to accelerate the timing of the Trial Skills Boot Camp to train 26 new people, including 11 new attorneys since December.

There is a serious need for DN training, but the whole DN system is stopped in its tracks and major training can't be deployed until the legislative results are known. Mr. Olson is currently working on a new employee orientation program because the existing orientation system is breaking down in implementation. The DVDs tend to disappear, and replacements aren't requested, so new attorneys are once again getting a stack of files on day one, instead of a week-long orientation.

Upcoming training events include support staff training in April, a summer appellate defender workshop, and youth court and civil commitment trainings, also planned for summer. Mr. Olson is president of the Montana Association of Criminal Defense Lawyers this year and has planned this year's conference at Chico to be specifically applicable to public defenders, including a detailed presentation on attorneys' relationship with the Office of Disciplinary Counsel (ODC).

Chairman Gillespie heard from Judge Menahan that there is a need for more training on plea bargaining for some of the younger lawyers. Chairman Gillespie responded to Judge Menahan that the reason OPD is seeking additional FTE attorneys to relieve managers' caseloads is so that they can mentor the

inexperienced lawyers. In the Helena region, Regional Deputy Public Defender Jenny Kaleczyc is carrying over 100 cases, leaving very little time to assist the new attorneys she supervises. Mr. Olson said that plea agreements were a topic at last year's annual conference but it is an ongoing challenge. The hesitancy to plea bargain is also related to the aggressiveness of the ODC, where it seems trial is the only desirable outcome.

Mr. Olson had one more comment on DN practice. The Commission may hear in the next week or two about the poor quality of representation OPD is providing in DN cases. As someone trying to coordinate a statewide group, he knows that the DN practice is in disarray with the law being implemented in different courtrooms in different ways. There is a definite need for training, but first there needs to be some uniformity, which may be resolved legislatively.

*F. Capital Defense Coordinators' Report*

Mr. Olson and Ms. Neal are coordinating the two Sidney cases, and Regional Deputy Public Defender Peter Ohman is acting as case coordinator for the potential capital case related to the prison homicide. Ms. Neal said that the hope is that providing adequate resources and spending the necessary money at the trial level will save money at the appeal and post-conviction levels. One of the hidden costs of capital defense is that the regional deputies are OPD's most experienced lawyers, and many are death penalty certified. Eventually they may be tapped to coordinate a case, requiring them to be relieved of at least some of their managerial responsibilities.

Chief Hooks is trying to develop an ongoing resource for capital cases, and sees a need to be proactive in potential capital cases with the goal of trying to talk the prosecutor out of filing for the death penalty. Prosecutors get help from the attorney general to get a second opinion on the filing, but the defender must give the best service possible while waiting for that decision.

Commissioner Petaja asked about the chances for abolition of the death penalty during this session. Chief Hooks replied that although the proponents once again made very compelling arguments, there is still substantial opposition as well. He expects a robust debate if the bill gets to the floor.

*G. Financial and Operating Status*

Administrative Director Harry Freebourn went through the standard operating report and noted highlights. On page 1, 11 of the 220.5 FTE are modified (temporary) positions. So far, six of the 11 have been approved through the first round of budget hearings. The increase in contractor costs on page 2 includes the capital defense contractors, but there has been significant increase in all areas, especially DN. The equipment increase reflects a large number of computer replacements. The Supplemental Funding on page 3 will probably end up at \$3.1 million instead of the \$2.5 million on the report.

The new case estimate is for a 3% increase in FY 13. From FY 08-FY 11 the agency was carrying 27,000 cases, and it is now a 30,000 plus case system, which is a significant increase. The number of active cases makes it pretty clear why the agency requested 37 new FTE.

Based on current estimates in the Assessment/Collection report, Mr. Freebourn expects to carry some special revenue forward and has increased the request for spending authority for next year. Chairman Gillespie said that the financial audit criticized the agency's handling of accounts receivable and collections. Unfortunately, OPD has very little control over the fees collected by the courts. He is firmly convinced that the clerks of court are accounting for OPD special revenue funds because that is the only way the judge knows if the client is complying with the court's judgment, but the clerks are not cooperating with OPD. In addition, the Department of Revenue will not accept a transfer of bad debts from OPD because they require social security numbers for each receivable, which OPD does not collect.

The agency drafted a bill that would require the clerks of court to account for the money they receive and send monthly reports to OPD. If it is to be introduced, a decision must be made soon. Chairman Gillespie expects the judges and the clerks of court would resist the legislation as time-consuming and costly to them, and with no associated benefit since the funds go to the state and not to local governments.

#### **5. 2015 Biennium Budget and 2013 Supplemental Funding**

Mr. Freebourn explained the Budget Items Worksheet. The green column shows legislative action so far (through round one of subcommittee hearings). There is still a long way to go in the session.

The \$2.5 million supplemental request is primarily for Program 1 due to capital defense, turnover and DN costs. The \$200,000 Program 2 supplemental request is also related to high turnover and an increase in DN cases.

#### **6. Public Comment**

Scott Crichton, Executive Director of the ACLU-Montana, said that OPD staff have given outstanding legislative presentations, but the legislature doesn't seem prepared to make the budget commitment needed to fix the public defender system. They are "talking about peanuts when the whole circus is at stake."

The two messengers for public defense right now are the Public Defender Commission and the ACLU. Mr. Crichton believes that to prevail, other players must be brought to the fore soon. The over-burdened public defense system affects the court system, jails and others in the justice system and those collateral damages need to be highlighted. To make the promise of Gideon a reality, the chorus must be expanded beyond the duo of the Commission and the ACLU.

Lisa Kauffman introduced herself as an OPD contract attorney since the agency's inception. Her work is 60% DN and 40% criminal cases. She said that although DN cases are called "civil" cases, she believes they are a prosecution of parents, culminating in termination of parental rights. She is very concerned that as funding decisions are made, both parents and children retain their right to effective representation. Someone needs to represent the child's expressed wishes since everyone else is already advocating for their best interest.

Ms. Kauffman wants to ensure that attorneys representing parents and children in DN matters be able to bridge the criminal arena and represent their clients in all matters if there are criminal charges involved. She believes that training to a standard of excellence in DN matters is crucial to helping to alleviate the financial drain; DN practice should not be considered a cottage industry, with attorneys dragging cases out unnecessarily.

Chairman Gillespie said that item 8 on the agenda regarding proposed legislation to relieve OPD of DN cases was something OPD was asked to draft before the session. The reality is that DN cases aren't going anywhere. The courts won't take them back and it would surely cost more to assign children's representation to another entity. Ms. Kauffman suggested that other agencies (DPHHS, the court administrator) contribute to the "DN pot."

Mr. Crichton said that the resources for handling DN cases were missing from OPD's budget since inception. A case must be made to the legislature to adequately fund DN work and to raise the contractor rate to \$80 per hour.

## **7. Legislative Update**

Mr. Freebourn gave a status update on OPD legislation. LC 1717 to suspend payment of public defender fees during periods of incarceration is still in drafting. HB 93 and SB 53 easily cleared the first house but were then tabled in committee after transmittal.

There is only one budget bill so far this year, HB 2. It is still in the very beginning of the process, but a market adjustment for attorneys was approved. HB 13, the employee pay plan, provides for raises for all state employees. If funded, the 5% increase each year is supposed to keep employees in line with the market. HB 3, the supplemental funding bill, was discussed previously. The final OPD request is expected to exceed \$3 million.

Chief Hooks reviewed the remaining bills with fiscal impact. Bills with increased penalties result in more vigorous resistance by the client—they are not as willing to plead guilty or plead down, and want to go to trial rather than accept the higher penalties. When there is no concrete data with which to make an analysis, but the bill may have an impact, the fiscal note is submitted as “unable to quantify.”

## **8. Proposed Legislation Relieving OPD of DN Cases (\*Action Item)**

Chairman Gillespie said that prior to the legislative session OPD was asked to draft a bill to remove OPD’s responsibility for handling DN cases. The draft bill included as agenda item 8 was his effort at fulfilling that request, but he did not seek a sponsor for the bill. The deadline for introducing bills is coming up soon, but there is a later deadline for committee bills, so there is still time to pursue sponsorship. Chairman Gillespie, Chief Hooks and Chief Zolynski decided they wanted the Commission’s input to decide whether they should seek introduction of the bill.

Representative Kim Dudik’s idea to contract with Montana Legal Services Association (MLSA) for the children’s representation, similar to Senator Shockley’s efforts in the previous session, was introduced as HB 504. This bill would require OPD to contract with an outside entity while still paying for the service from the OPD budget. Chairman Gillespie’s biggest concern is that the outside entity could not provide services as cost-effectively as OPD and by using additional resources for DN cases, they would reduce OPD’s ability to provide other services.

Commissioner Petaja is troubled by the idea of this bill. Discussion of DN cases was paramount during the many meetings of the Strategic Planning Committee because they currently represent about 20% of the OPD budget. However, the committee’s consensus was that there is no better agency to handle these cases, and we should commit ourselves to defending them and to obtaining sufficient funding to do so. Commissioner Olson concurred. Commissioner Daem said that it is a bad idea to lower our standards in respect to those that we serve.

Chairman Gillespie invited public comment.

Alison Paul, MLSA Executive Director, said she was contacted by Representative Dudik and did not seek the legislation. However, MLSA would be interested in entering conversations with OPD about the possibility of contracting for children’s services. They currently do some of this work for OPD on contract basis, but do not represent parents because it would create too much conflict in their core work. Chairman Gillespie thanked Ms. Paul for coming and assured her that he did not mean to criticize MLSA in any way, understanding that they were sought out, just as in the previous session. The agency would be happy to engage in conversation. Ms. Paul is scheduled to meet with Chief Hooks next week, but she said that they probably could not provide services at the same low cost that OPD does. They would have to hire staff in their existing offices in Billings, Missoula and Helena, and would have partners in other locations such as Kalispell and Eastern Montana.

Mr. Olson said that one of the problems with moving children's representation away from OPD is that HB 432 is directly opposed to the Standards adopted by the Commission at the last meeting, which are based on national ABA and NACC standards. HB 432 proposes to take what is a very minority view nationwide, for the child's attorney to promote best interests instead of expressed wishes, and make it statutory in Montana.

There was no additional public comment.

Commissioner Olson moved that the Commission oppose the proposed legislation drafted as agenda item 8, including introduction or support of the draft bill. Commissioner Petaja seconded and the motion carried unanimously.

Commissioner Novak moved that the Commission go on record in opposition to HB 504 and HB 432. Commissioner Petaja seconded and the motion carried.

#### **9. Ethical Caseloads and Refusal of Appointments (\*Action Item)**

Chief Hooks presented a resolution for the Commission's consideration which would authorize him to take necessary action, including limiting acceptance of new cases, to address case overloads. The resolution would give this authority to the Chief on an ongoing basis, but the instant issue is in Region 4, Helena.

Commissioner Petaja asked to make a preface remark. At the December 14 meeting, he submitted language to be included in the strategic plan as goals 9 and 10 to monitor caseloads and to establish reasonable and ethical caseloads. He believes the language in the draft resolution meets the intent of what was approved at that meeting.

Chief Hooks said there is no exception made to an attorney's ethical obligations for public defenders, or for managers or the chief. He has researched ethical rules, formal opinions, what's going on in other states, and consulted with his regional deputies. It is likely that at some point, we must temporarily stop accepting new cases, although we won't back out of existing cases.

There are no indications that caseloads will go down, and it is partially responsible for the problem with excessive turnover. The revised case weighting system (CWS) more accurately represents what we are doing and there are no healthy regions. Attorneys in the red flag area are required to consult with their manager to determine if they are in crisis mode. The number of FTE requested for the next biennium was designed to get everyone out of the red flag area, but those numbers are now out of date already. Chief Hooks emphasized that it is no fault of Ms. Kaleczyc's that her region is in crisis. They are losing attorneys to the county attorney's office and other state agencies for more money and smaller caseloads. She has constant turnover.

Chief Hooks said there is no option other than to go to the judges and ask them to stop appointing us to cases for some period of time. They need to know that we are no longer able to effectively represent clients and we are putting law licenses at risk.

Commissioner Daem asked if there is a hierarchy in turning down cases and then starting to take them again? Chief Hooks said that treatment courts are probably at the top of the list because we are serving people who aren't indigent there. Next would be misdemeanors where jail time not likely to be imposed. There are no good choices, but continuing with the status quo is the worst choice of all. Commissioner Petaja asked if the judges would enter into a conversation to help decide who gets a public defender. That is Chief Hooks' intent, to work with the courts to solve the problem. Chairman Gillespie offered a reminder

that 46-8-101 was amended in the last session to allow the judge to announce at the initial appearance that jail time would not be imposed, eliminating the requirement to appoint a public defender. However, they are currently doing it very seldom.

Ms. Kaleczyc described the challenges in her region. Since she assumed the regional deputy position last May, she lost 7 of 11 attorneys, three office managers, one investigator and one receptionist. There is no institutional knowledge, which creates practical issues, such as assigning cases, paying bills, etc. Her attorneys don't have the experience to handle the kinds of cases they are assigned. Clients aren't getting the best outcomes because they aren't being taken to trial. Jails are overcrowded and the prosecutors and judges blame her office for slowing down the system. She has concerns about limited representation. She has seen simple cases such as driving while suspended, with a two day jail time, where a particular judge has sentenced someone to six months in jail. She has seen a case with the same charge go to trial and win, so having a public defender can really make a difference even in these types of cases. The county attorney keeps hiring new positions and enlists the Attorney General's office to help with overflow. Public defenders don't have those luxuries. Her personal caseload isn't large, but she spends all of her time triaging, plugging holes and filling in for people who miss a day of work. Her region also suffers from a severe shortage of contract attorneys. There are only 13 on the list, and their practice is mostly limited to DN and misdemeanor cases. Both short term and long term solutions are needed.

Ms. Kaleczyc agrees that drug court is time-consuming and serves a small number of clients post-adjudication, and it would be at the top of her list to limit those cases. Commissioner Petaja asked why we are in that court in opposition to the Commission's direction. Chief Hooks said that it is supposed to be a diversionary court, but it isn't being run that way. Commissioner Daem stated that some drug courts deal strictly with DN cases where the placement of children is at risk (family court). Chief Hooks agreed that we can't ignore the benefits of this type of court when working through the options.

Mr. Freebourn asked if the pay ladder increase would help in Ms. Kaleczyc's region. She replied that it would move them significantly closer to parity and should make a big difference. Most of the departing employees love public defender work, they just can't afford to keep working for OPD. Mr. Freebourn said that the budget subcommittee thinks that if there is pay parity we won't need additional FTE. Ms. Kaleczyc said that even if she had experienced attorneys there still aren't enough of them. Her attorneys' caseloads are sometimes triple the trigger number of 125 hours, so she has the conversation every month with every attorney.

These problems didn't just develop recently, but have been in existence in the Helena region for the last six months. Commissioner Novak said that the Commission needs to adopt this resolution to ensure that clients are getting adequate counsel, and to ensure that our employees aren't jeopardizing their licenses. Chairman Gillespie said that in reviewing ABA formal opinion, it is very clear that the attorney's obligation is first to the clients they already have. Assuming they can handle their existing caseload, the attorney's job is to file a motion to withdraw from new case assignments. He noted that the license of not only the attorney, the manager and the chief, but also of every lawyer on the Commission is at risk if we fail to fulfill our ethical obligations.

Chairman Gillespie invited public comment. Mr. Crichton said that if the Commission is worried about the appearance of grandstanding due to the timing of the resolution at this point of the legislative session, they should realize that those people will never be on your side, so it shouldn't guide your decision.

Commissioner Petaja moved to adopt the resolution as drafted. Commissioner Gallik seconded and the motion passed unanimously.



Chief Zolynski would like the resolution to be clear that it applies only to Program 1 at this point. He is still developing a case weight system for the Commission's approval, and then he would be comfortable with a similar resolution for Program 2.

**10. Old Business/New Business**

There was no old or new business to discuss.

**11. Public Comment**

There was no additional public comment.

**12. Set Future Commission Meeting Dates**

The next meeting will be scheduled after the end of the legislative session unless legislative activity requires Commission action, in which case Chairman Gillespie will convene a phone meeting.

The Commission has worked hard over the past year and Chairman Gillespie suggested a breather until July. Pending projects are audit recommendations regarding accounts receivables and eligibility determination. Chairman Gillespie's concerns remain that the agency is perceived as representing people who aren't entitled to public defender services, and that there are insufficient FTE to process applications for 30,000 cases per year and do it well, reliably, and with proper documentation. Another project to be reinvigorated is determining the correct rate for contract attorneys. The strategic plan is ready for delivery once a cover letter has been drafted to accompany it. Commissioners Olson and Petaja did the bulk of the work on the plan and were asked to draft the letter.

**13. Adjourn**

The meeting adjourned at 3:35 p.m.